

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals

Panel: Neff, P.J., Murphy and Griffin, JJ.

GRAIG A. KLAPP,

Plaintiff/Appellant,

v.

UNITED INSURANCE GROUP
AGENCY, INC.,

Defendant/Appellee.

Supreme Court Case No. 119175-6

Court of Appeals Docket No. 219330

Consolidated with Docket No. 219299

Van Buren Circuit Court
Case No. 97-043305-CK

**BRIEF ON APPEAL - APPELLEE
ORAL ARGUMENT REQUESTED**

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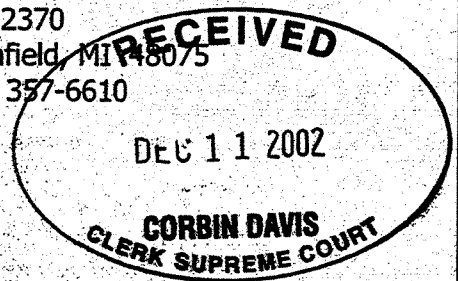


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STATEMENT REGARDING JURISDICTION

Pursuant to MCR 7.306(A), Appellant's statement of jurisdiction is complete and accurate.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Whether the Court of Appeals was correct in determining that the term of the contract between the parties defining retirement was clear and unambiguous for the purpose of determining Plaintiff/Appellant's entitlement to the payment of renewal commissions?

Defendant/Appellee answers "yes."

Court of Appeals answered "yes."

Plaintiff/Appellant answers "no."

2. Whether Plaintiff/Appellant's proposed interpretation of the definition of retirement is unreasonable and violative of the rules of contract construction?

Defendant/Appellee answers "yes."

Plaintiff/Appellant answers "no."

3. Where, as in the present case, a contract is drafted entirely by one party, without any bilateral negotiations, is extrinsic evidence admissible to clarify ambiguity in the contract or is any ambiguity in the contract simply to be construed against the drafter (without the considering any extrinsic evidence)?

Defendant/Appellee answers "yes."

Plaintiff/Appellant answers "no."

The Court of Appeals did not answer this question.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

This case involves the imbedded question of whether a party to a contract is entitled to totally ignore and essentially delete a provision of a contract which would otherwise preclude recovery simply based upon factually unsupported supposition that the particular contract provision was a "carry-over" from an alleged previous version of the contract; thus inventing or creating an ambiguity in the contract in order to support a patently unreasonable interpretation of the contract.

There is only one contract at issue in this case; the one Appellant signed. The contract that Appellant signed to be an insurance agent with Appellee is clear and unambiguous in its terms regarding the definition of "retirement" to entitle Appellant to receive renewal commissions after ceasing to be an active insurance agent. Appellant must be age 65 and have 10 years of service with the company (Appellee), whichever is later, in order to trigger entitlement to the payment of continued renewal commissions after he disengages from the insurance industry.

The Court of Appeals correctly applied the clear and unambiguous definition of retirement to Appellant's situation and found that Appellant simply did not meet its requirements. Judgment in Appellee's favor was accordingly granted. In the very narrow context of this case; whether the contract's definition of retirement is clear and unambiguous and whether Appellant satisfied the criteria of that definition, this Court should affirm the Court of Appeals' decision.

A. Factual Background

On March 30, 1990, Appellant Craig A. Klapp [hereinafter "Klapp"] signed a contract with Defendant-Appellee United Insurance Group Agency, Inc. [hereinafter "UIG"], hereinafter

referred to as the "Agent's Agreement." (9a-16a). Pursuant to the Agent's Agreement Klapp was an independent contractor. (9a-16a). Klapp worked as an agent of UIG until approximately January of 1994, when he was in his mid forties. He then decided to "retire." (1b.) Upon "retiring," Klapp did not notify UIG, in writing or otherwise, that he had in fact allegedly "retired." (1b.) Upon his alleged retirement, Klapp went to work for LCI, a telephone company, in Chicago where he worked for approximately six months. (1b., 2b.) After having worked for LCI for six months Klapp allegedly "unretired," and came back to work for UIG as an agent. (1b.)

When Klapp came back to work for UIG, in approximately July 1994, he was given credit for the time he had worked prior to allegedly retiring in January of 1994 pursuant to the vesting schedule in the Agent Agreement. (13a., 1b.-4b.) This point is significant because the vesting schedule, as it applies to UIG's agents meeting the definition of retirement, has meaning because after ten years of service, and upon reaching age 65, the agents can then receive 150% of vested renewal commissions. (9a.-16a.)

During the time period at issue in this lawsuit, Klapp read, reviewed and had a copy of the Agent's Agreement and Agent's Manual, (which was incorporated into and made a part of the agreement between the parties by reference thereto in the Agent's Agreement). (9a., 13a., 9a, 4b.-8b.) Klapp signed the Agent's Agreement and was aware that he was bound by the terms of that document as well as the provisions of the Agent's Manual. (4b., 5b.) Klapp read the provisions in the Agent's Agreement and Agent's Manual regarding the requirements to be entitled to have commissions "vest" and be payable upon "retirement," as well as the definition of "retirement" for purposes of the agreement between the parties. (8a., 9a., 5b.) The provisions read together comprise the promises of UIG regarding the continued payment of

renewal commissions to those agents that reach retirement under the contract. These provisions read as follows:

Vesting Schedule. In the event of a termination of this Agreement for reasons of death, disability, **and retirement (as defined in the Agent's Manual)**, Agent as set forth below on the date of execution hereof shall be entitled to receive a percentage of renewal commissions then payable from premiums on Agent's policies in place, applicable to such amounts as would otherwise have been payable to Agent in accordance with the following vesting schedule:

. . .

Retirement:

Retirement is understood to be disengagement from the insurance industry. Vestment for retirement is age 65 or 10 years of service whichever is later. (See 9a-16a and 8a)

Upon "unretiring," Klapp worked as an agent for UIG from approximately July of 1994 through August of 1997 at which time he was in his late forties. From July of 1994 through the date of his termination, Klapp was promoted by UIG in two respects. First, Klapp was made an office manager in the Kalamazoo, Michigan, office. As an office manager, Klapp was entitled to commissions on what he sold personally, as well as what was sold by the other agents in the Kalamazoo office. Second, Klapp was made a member of the "Star Team." The Star Team is a compilation of the top 16 trainers in the company. In 1995 Klapp went to Philadelphia as a member of the Star Team. (9b.-12b.)

In spite of Klapp's promotions by UIG, his production of business consistently dropped during the term of his contract and on August 13, 1997 Klapp's Agent's Agreement was terminated by UIG's officer, Kenneth Schroeder. (12b.)

B. Procedural Posture

On August 13, 1997, UIG notified Klapp, pursuant to his Agent's Agreement, that the contract was terminated. (45a.) Kenneth Schroeder, a Vice President of UIG, terminated the contract. According to the contract, Klapp was required to produce a minimum amount of business in order to remain active and prevent termination of the contract. (13b.) Since April of 1997, Klapp had produced absolutely no business for the company. (14b., 15b.) Based upon the total lack of production of business by Klapp for four full months UIG ordered a licensing history from the State of Michigan. (16b.) The licensing history obtained by UIG showed, apparently in error, that Klapp was contracted with companies to sell insurance policies for which UIG was not. This was a violation of the contract between Klapp and UIG. (17b., 18b.)

Based upon Klapp's non-production and the State of Michigan Licensing History showing Klapp improperly contracted with companies with whom UIG was not contracted, Klapp's contract was terminated. It is a factual dispute as to whether Klapp made any attempt to contact UIG regarding the August 13, 1997, termination letter. Notwithstanding that fact, less than two weeks later, August 26, 1997, Klapp filed the lower court action.

Klapp's initial lawsuit alleged a breach of contract, Count I, which complaint was subsequently amended on October 3, 1997, to add Count II, a claim for a violation of MCLA section 600.2961, the Michigan Sales Representatives' Commission Act (SRCA). Because Klapp's allegations presented questions of law for the trial court to decide, UIG filed its motion for summary disposition seeking: 1. A ruling that the terms of the contract were clear and unambiguous, thus a question of law for the court, and that Klapp did not meet the contractual requirements for retirement and the payment of renewal commission, 2. A ruling that the "future damages" claimed by Klapp were speculative in nature as a commission is paid only

when an actual renewal occurs, and 3. A ruling that the SRCA did not apply to the sale of policies of insurance in the context of the extremely regulated insurance industry.

On May 6, 1998, the Circuit Court held a hearing on UIG's motion for summary disposition, and other motions before the Court. The Circuit Court took the motion under advisement and on May 19, 1998 issued a written opinion. The Circuit Court dismissed Count II of Klapp's complaint, (76a-78a), limited damages, if any, to back commissions unpaid at the time of verdict, and ordered that specific performance would be the remedy as to future commissions whereby Klapp would be paid by UIG monthly for renewal commissions earned through renewals of policies he wrote in the past. However, the trial court found that it was a question of fact for the jury as to whether the terms of the contract at issue were ambiguous. The court specifically held:

In regard to Issue I, (dismissal of Klapp's breach of contract action), the court believes that the Defendant's motion for summary disposition should be denied. **In reviewing all the pleadings, transcripts, and other documents, the court finds that it is an issue for the trier of fact to determine whether or not the language of the contract and actions by the parties render an ambiguous or unambiguous contract.** The Plaintiff alleges that the contract, the vesting schedule, and the admitted "mistakes" by the Defendant create a contract that could be considered unclear by its own written terms as to the issue of renewal commissions. (76a-78a).

The trial court had found that the determination of whether the contract was ambiguous was for the trier of fact.

It was Klapp's position at the hearing on UIG's motion for summary disposition that he was entitled to bring in extrinsic evidence of course of performance, deposition testimony and any other extrinsic evidence he deemed necessary to define the terms of the contract. Klapp asserted that all this extrinsic evidence was appropriate even before the trial court determined that the contract was in fact ambiguous. The trial court found that it was a question of fact for

the jury to determine: 1. Whether the contract was ambiguous, and 2. The terms of the contract. (76a.-78a.)

UIG disagreed with the ruling of the trial court in its Opinion and Order and asserted that it is a **question of law for the court to determine** whether a contract is ambiguous. It was, and is, UIG's position that such a determination is made by the court viewing the terms of the contract and the meaning of the terms in the context of the contract.

A trial was held and on January 22, 1999, and a jury verdict was rendered in favor of Klapp and against UIG in the amount of \$45,882. Pursuant to the trial court's ruling at summary disposition, the jury ordered specific performance as to all future renewal commissions. UIG posted a bond with the Circuit Court for the back commissions and had been paying Klapp renewals owed on a monthly basis.

On May 3, 1999, UIG timely appealed the May 19, 1998, Opinion and Order denying in part UIG's motion for summary disposition and the April 14, 1999, Judgment entered in this case.

The Court of Appeals agreed with UIG and on February 9, 2001, in an unpublished opinion, held the trial court erred in leaving the determination as to whether the terms of the contract were ambiguous to the jury. The Court of Appeals found the definition of retirement to be clear and unambiguous and entered judgment in UIG's favor holding that Klapp did not meet the definition of retirement in the contract. In addition, the Court of Appeals found:

Contrary to plaintiff's contention, adoption of the agent's manual's complete definition of "retirement" does not create an ambiguity in the contract or create a contradiction with regard to the "vesting schedule." It is clear that the entire vesting schedule is relevant for agents who die or become disabled while in defendant's employment. However, given the agent's manual's definition of retirement, only the vesting schedule beyond 10 years of service is relevant for agents who retire. (102a.)

Based almost entirely upon the foregoing passage, Klapp filed a motion for rehearing in the Court of Appeals. In his motion, Klapp claimed that the Court of Appeals overlooked paragraph 5(A) of the Agent's Agreement. Specifically, Klapp claimed that paragraph 5(A) provided for 100% vesting of renewal commissions for an agent's death or disability. As such, Klapp argued, the provisions of paragraph 5(B) have no application to circumstances of death and disability, and the Court of Appeals was therefore incorrect in its ruling that the vesting schedule had meaning. Klapp made that argument even though he never claimed he was disabled or was dead. By making that argument, Klapp sought to expand the scope of the litigation from the definition of retirement in the Agent's Agreement and Agent's Manual to some hypothetical scenario involving an agent claiming renewals under either the death or disability scenario. The Court of Appeals denied Klapp's motion for rehearing without comment.

Section 5(A) of the Agent's Agreement clearly sets forth that, with respect to death or disability of an agent, the agent "shall thereafter be entitled to receive one hundred percent (100%) of such renewal commissions then payable" (12a.) Section 5(B) then sets forth the percentage of the vested renewal commissions payable under the foregoing circumstances. (13a.) For instance, an agent with two years of service who dies or becomes disabled will be entitled to 10% of his renewal commissions. An agent with six years of service who dies or becomes disabled is entitled to 90% of his renewal commissions, and so on. (13a.) Again, the Court of Appeals found "[I]t is clear that the entire vesting schedule is relevant for agents who die or become disabled while in defendant's employment." (100a.) Klapp's argument to the contrary on rehearing were not well taken and his motion was denied.

On May 8, 2001, Klapp filed his Application for Leave to Appeal to this Court, which was granted on September 10, 2002. In his brief on appeal to this Court Klapp, once again, reverts back to literally page after page of extrinsic deposition testimony evidence to support his

claimed interpretation of the terms of the contract, virtually ignoring the direct issue in this case; the definition of "retirement" in the contract and whether Klapp meets that definition. The intent of the contract is clear from the terms of the contract itself; that entitlement to renewal commissions upon retirement are determined by whether or not the agent has been with the company for 10 years and is age 65. Klapp continues to focus upon the admitted mistake of UIG in paying agents renewal commissions when they were not entitled to be paid. This is the focus of Klapp's brief simply because he knows that he does not, as admitted at deposition and at trial, meet the retirement definition as plainly contained in the language of the agreement. (4b.-7b.)

At page 17 of Klapp's Brief on Appeal, he directs the Court's attention to Section 5(A) of the Agent's Agreement for its application to entitlement of agents to renewal commissions under the circumstances of death or disability. However, that section of the Agent's Agreement also includes retirement and states that if the agent shall have aggregated eight or more years of service then his vesting shall be determined in accordance with the normal vesting schedule. Klapp has only seven years of service with the company and simply does not meet either a ten or eight year retirement requirement. Construing the two provisions against the drafter UIG, Klapp still fails to satisfy the retirement years of service requirement and is not entitled to renewal commissions under the contract.

ARGUMENT

A. The Contract's Definition of Retirement Is Not Ambiguous

1. The Court of Appeals Correctly Reversed The Trial Court's Obvious Error In Allowing The Jury To Determine Whether The Terms of The Contract Were Ambiguous

This Honorable Court reviews the the question of whether a contract's terms are ambiguous de novo. *McKinney v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 177; 405 NW2d 88 (1987); *Hewett Grocery Co v Biddle Purchasing Co*, 289 Mich 225, 237; 286 NW 221 (1939).

In the instant case, the trial court erroneously left the determination of whether the terms of the contract at issue were ambiguous to the jury. The trial court held:

In regard to issue I, the court believes that the Defendant's motion for summary disposition should be denied. In reviewing all the pleadings, transcripts, and other documents, the court finds that it is **an issue for the trier of fact to determine whether or not the language of the contract and actions by the parties render an ambiguous or unambiguous contract. The Plaintiff alleges that the contract, the vesting schedule, and the admitted "mistakes" by the Defendant create a contract that could be considered unclear by its own written terms as to the issue of renewal commissions.**

The trial court held that there was a question of fact as to whether the trier of fact could find the terms of the contract ambiguous. In so finding, the trial court gave the jury absolute authority to view any and all extrinsic evidence Plaintiff sought to present as an aid to interpretation *prior* to a determination that the terms of the contract were ambiguous. The parol evidence presented to the jury included prior contracts, which are again strongly relied upon by Klapp in this Court and which have no relevant connection to the contract which bound Klapp. The parol evidence also included the past practice and manner in which UIG had

mistakenly paid commissions under the contract to Klapp as well as other unrelated Agents. It is well settled that the **preliminary determination** as to whether there is an ambiguity in the contract is a **question of law for the court not the jury**. "Whether ambiguity exists in a written instrument, **so as to authorize the admission of extrinsic evidence to explain it, is a question of law for the trial court.**" *Glenwood Shopping Center Limited Partnership v K-Mart Corporation*, 136 Mich App 90, 98; 356 NW2d 281, 286 (1984) (citing, 30 Am Jur 2d, Evidence, section 1069).

The proper analysis by the trial court should have been to make the initial determination as to whether the contract provision at issue was ambiguous. If the contract was determined to be ambiguous, only then could extrinsic evidence be presented to aid in determining the parties' intent. Id.

If the Court determined that the contract was not ambiguous, then the presentation of extrinsic evidence, including past performance under the contract in aid of interpretation should have been precluded. *Michigan Chandelier Co v Morse*, 297 Mich 41; 297 NW2d 64 (1941) (holding that practical interpretation of contract by the parties thereto can be regarded only where contract is of doubtful or ambiguous meaning); *Ditzik v Schaffer Lumber Co*, 139 Mich App 81; 360 NW2d 876 (1984) (holding that where provisions of a contract are clear and unambiguous, contract language cannot be altered by prior course of performance); *Craig v Bossenberry*, 134 Mich App 543; 351 NW2d 596 *app den* (1984) (holding that contractual terms are not subject to judicial interpretation unless they are ambiguous).¹

¹Federal Courts have consistently followed this Court's and the Michigan Court of Appeals' analysis and well settled principles of contract construction; *Reynolds Spring Co v L A Young Industries*, 101 F2d 257 (1939) (holding that where contract is not ambiguous there is no room for construction); *Dickinson v Stokes*, 62 F2d 84 (1932) (holding that where terms are clear extrinsic aid to construction is unnecessary); *Cleveland-Cliffs Iron Co v Chicago & North Western Transport Co*, 581 F Supp 1144 (1984) (holding that if contract terms are not ambiguous then contradictory inferences which may be drawn are subjective, and irrelevant); *Aetna Cas & Sur Co v. Dow Chemical Co*, 28 F. Supp 2d 440 (1998) (holding that under Michigan law court must enforce contract as written without looking to extrinsic evidence); *Steinmetz Elec Contractors Ass'n v. Local Union No 58 Intern Broth of Elec Workers, AFL-CIO*, 517 FSupp 428 (DC Mich 1981) (holding that the parties may disagree as to the meaning of contract terms does not establish

Based upon the trial court's erroneous application of the law of contract interpretation, the Court of Appeals correctly reversed the trial court's decision. *Bracco v Michigan Tech Univ*, 231 Mich App 578; 588 NW2d 467 (1998) (holding that when a trial court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct); *Fletcher v Fletcher*, 229 Mich App 19; 581 NW2d 11 (1998).

The trial court committed clear error in failing to determine, as a matter of law, whether in fact the terms of the contract were ambiguous before allowing the extrinsic evidence to be presented by Klapp to the jury. The extrinsic evidence was Klapp's entire case. Throughout the case at the trial court level, at the Court of Appeals, and now in this Court, Klapp continually refers to the performance of the contract by the parties couched only in the context of extrinsic evidence. Having not yet determined that the contract was ambiguous, allowing this evidence was error. *Port Huron Educ Ass'n v Port Huron Area School Dist*, 452 Mich 309; 550 NW2d 228, 237 (1996) (holding that the initial determination of whether contract language is ambiguous is a question of law).

The trial court failed initially to determine as a matter of law whether the terms of the Agent's Agreement were in fact ambiguous and subject to extraneous evidence to aid in interpretation. Instead, the trial court put the issue to the trier of fact. Klapp took full advantage of the Court's error and hammered on the fact that UIG had, in the past, erroneously paid renewal commissions contrary to the terms of the Agent's Agreement. A quote from Klapp's closing argument makes the point:

Okay, your basic choice, do you pick the ten-year way or the nonsense way? Under the ten year way, the way they were doing it for ten years, Mr. Klapp gets his share of the money that keeps going into United Insurance, the way that everyone else is getting it for ten years. He gets his small share of it. Under the

the existence of an ambiguity in the legal sense, and thus summary judgment may be appropriate where contract terms are clear and unambiguous, even if one party asserts results different from that embodied in terms was intended).

nonsense way, the way they want it, Mr. Klapp gets nothing, only United Insurance keeps not only what they are continuing to get anyway, but now they get to keep Mr. Klapp's share as well. And that is your choice, ten-year way or nonsense way. (19b.-20b.)

Notwithstanding his arguments at summary disposition to the contrary, Klapp **admitted** through his counsel in closing argument to the jury that the contract, with respect to the definition of retirement, is clear. Klapp admitted: "[Y]ep, this I'll admit, this language is here in the Agent's Manual. And this language is here that says, vestment for retirement is age 65 or ten years of service, whichever is later." (21b.)

Klapp, however, in the trial court, in the Court of Appeals and now in this Court argues that this clear language should be ignored because the clear language regarding entitlement to renewal commissions under the circumstances of retirement is for the "old" contract where there is no vesting schedule. Klapp simply asked the jury to omit that portion of the contract that he **admitted** as set forth in the paragraph above. The jury had to ignore or omit the "age 65 or ten years of service" requirement in order to find for Klapp. Omitting clauses or portions of a contract is totally contrary to the law in Michigan with respect to the proper manner of contract interpretation. (21b.) This is likely the reason that contract interpretation is a matter of law for the courts, not a question of fact for the jury.

Klapp's whole case is based upon extrinsic evidence. The trial court erroneously refused to rule on the ambiguity question at summary disposition, thus paving the way for Klapp's introduction and admission of extrinsic evidence and allowing the jury go beyond the four corners of the contract **prior to a determination that the contract was ambiguous.**

Upon the Court of Appeals' de novo review of the record, the trial court's denial of summary disposition was properly reversed.

The Court of Appeals not only found that the trial court had committed clear error in leaving to the jury the question of whether the contract definition of "retirement" was ambiguous, but correctly decided that in fact the definition of "retirement" was unambiguous and that Klapp did not meet the requirements of that definition. Specifically, he was not age 65 and he did not have 10 years of service, (Klapp admittedly only has 7 years of service), thus precluding recovery of renewal commissions because he was not "retired" as that term is defined under the contract. The Court of Appeals was correct in its findings and those findings should not be disturbed on appeal.

2. The Contract Is Clear And Unambiguous With Respect To Klapp's Entitlement To Renewal Commissions

Klapp claims he is entitled to renewal commissions for being retired pursuant to the provisions of the Agents Agreement and Agent Manual. (8.a, 9a.-16a.). The relevant provisions state:

Vesting Schedule. In the event of a termination of this Agreement for reasons of death, disability **and retirement (as defined in the Agent's Manual)**, Agent as set forth below on the date of execution hereof shall be entitled to receive a percentage of renewal commissions then payable. (13a.)

Retirement:

Retirement is understood to be disengagement from the insurance industry.
Vestment for retirement is age 65 or 10 years of service whichever is later. (8a.)

Klapp admitted both at deposition and at trial that he is not 65 years old and does not have ten years of service. Thus, under the contract he is not vested for purposes of the payment of renewal commissions. Klapp admitted at trial:

Q: Now, you, when you signed up with United Insurance Group you signed a contract?

A: Uh-huh.

Q: And you understand when you signed a contract you make promises?

A: Uh-huh.

Q: Okay.

Is that a yes?

A: Yes.

Q: Okay.

And they gave you an Agent's Manual?

A: Yes.

Q: And did you look through the Agent's Manual?

A: Yes.

. . .

Q: And did you see it said 65 or ten years?

A: Probably.

. . .

Q: And then, so it wasn't erased in your manual?

A: No.

. . .

Q: You are not 65, are you?

A: No.

Q: Okay.

And you have not put ten years in?

A: No. (5b.-8b.)

Notwithstanding the foregoing admission, Klapp wants the retirement provision deleted from the contract. Klapp went so far as to, for the first time at trial of the matter, allege that there were some sort of oral promises made by a UIG employee by the name of Eric Dellinger. Klapp testified:

A: What I read and how this was explained to me by my manager in South Haven are two different things.

Q: So, what you are saying now is that you really are not going under the contract you signed now, now you want to use – to proceed under what some fellow in South Haven told you.

A: One of their managers. Mr. Dellinger explained the contract using only the vesting schedule to show me the rewards of being in this business for several years.

Q: Now, he hasn't testified yet, has he?

A: No.

Q: Is he going to?

A: He was my manager in '90.

Q: Are we going to hear from him?

A: It is up to you I guess.

Q: Okay.

A: I certainly won't put him on. (6b.)

Klapp admitted that he read both the Agent's Agreement and the Agent's Manual. He admitted that he specifically read the provisions regarding entitlement to renewal commissions

under conditions of retirement. He admitted that the provisions were not erased from his version of the Agent's Agreement and Agent's Manual. Notwithstanding those admissions, Klapp essentially relies upon the statements of Eric Dellinger to support his claimed modification and interpretation of the agreement.

UIG did provide for a method to modify the Agent's Agreement, but Mr. Dellinger was not an officer of UIG authorized to modify the terms of the Agent's Agreement or Agent's Manual, and oral modifications are precluded by the contract. The contract states:

9. AMENDMENT. This contract cannot be changed by any verbal promise or statement by whomsoever made, and no written modification or change will bind United unless it is signed by an officer of United Authorized to do so, and expresses an intention to modify or change this contract. Subsequent amendment to this contract may be made by United's preparing and transmitting to the Agent such an amendment. (14a.)

Klapp has neither complied with that method of modification, nor has he even alleged in the pleadings in this case that a modification occurred. *Westdale Co v Gietzen*, 29 Mich App 564; 185 NW2d 596 (1971) (holding that a written agreement may be changed only by consent or written agreement of the parties). Notwithstanding those facts, that is exactly what Klapp claims occurred, and is the manner in which his claims are couched before this Court. Klapp admits that he read and reviewed the Agent's Agreement and Agent's Manual, but relied upon the statements of an unauthorized UIG employee for his entitlement to renewal commissions. To accept Klapp's version of the agreement would be similar to binding General Motors to a conversation, notwithstanding that it was in error, that an unauthorized purchasing agent made with a vendor contrary to the terms of the written purchase order in place between the parties. The mistake would be corrected and the terms of the written agreement would be enforced on a going forward basis. In this case, that is exactly what the Court of Appeals correctly did.

The burden of proof to prove a modification of the contract lies with Klapp. *McCarty v Mercury Metalcraft Company*, 372 Mich 567; 127 NW2d 340 (1964). No evidence of a modification of the terms of the written agreement was either alleged in the pleadings or presented as evidence, until Klapp testified at trial of the matter and for the very first time claimed the contract's terms he was acting under were pursuant to representations made by a low level employee of the company. After admitting that the retirement provision in the Agent's Manual was a binding part of his contract, Klapp conjured up some sort of non-specific promise by his manager in South Haven back in 1990 in an effort to vary the clear terms of the contract. The foregoing testimony punctuates the problem in this case by allowing the admission of extrinsic evidence to interpret an otherwise clear and unambiguous contract; an ambiguity is not resolved, it is created. The line between **modification** of a contract and **interpretation** of a contract blur and eventually the two distinct concepts merge.

The solvent in attempting to wash away the confusion and ambiguity, literally created by the extrinsic evidence in this case, and filter out the nugget of proper interpretation of the contract terms, is the clear testimony from Klapp that the retirement provision of the Agent's Manual was part of his contract, and that he read and understood that provision; albeit an allegedly different understanding than the one he gained from discussions with Mr. Dellinger. (4b.-6b.) *Kmart Corp v Fireman's Fund Ins Co*, 88 F Supp2d 736 (WD Mich 1999) (holding that under Michigan law, where a specific contract clause is in conflict with general contract clause the more specific contract clause controls). Klapp's testimony clearly establishes that he was well aware of the contract's definition of retirement. Klapp should not now be entitled to repudiate that narrow portion of the agreement simply because he failed to meet its requirements.

The retirement provision Klapp admitted he read and understood is simply applied to the facts of this case, as the Court of Appeals properly endeavored to do. Pursuant to section 5(B) of the Agent Agreement, agents are entitled to vested commissions, as set forth in the vesting schedule, upon death, disability or **retirement as defined in the Agent's Manual (age 65, ten years of service)**. That's it. The fact that UIG made a mistake in overpaying renewal commissions does not remove the retirement definition from the contract. *L & S Bearing Co v Morton Bearing Co*, 355 Mich 219; 93 NW2d 899 (1959); *Michigan Chandelier Co v Morse*, 297 Mich 41; 297 NW 64 (1941) (holding that even when there has been a practical interpretation of the contract by the parties the practical interpretation is not relevant when the contract's terms are clearly set forth). In *Ditzik v Schaffer Lumber Co*, 139 Mich App 81; 360 NW2d 876 (1984) the Court held:

The trial court also improperly utilized plaintiff's performance of the prior 1977 agreement in determining that plaintiff was only entitled to one prospect per listing agreement. A prior course of performance cannot alter the clear and unambiguous language of the contract. Where the provisions of a contract are clear and unambiguous, the contract language is to be construed according to its plain sense meaning. Bank of the *Commonwealth v Criminal Justice Institute*, 102 Mich App 239, 244; 301 NW2d 486 (1980). The trial court's findings that the parties had established a course of dealing, on the basis of one prior contract, was clearly erroneous. GCR 1963, 517.1 (Although the Uniform Commercial Code does not apply to real estate transaction, compare MCL 440.2208; MSA 19.2208 and Comment 4 thereto indicating that a single occasion of conduct does not comprise a course of performance or course of dealing.) Id.

Klapp, of course, focuses this Court on the fact that UIG paid Klapp in error, in 1994 when Klapp "retired," (the first time). Notwithstanding that occurred, in error, it is not enough to modify the terms of the contract regarding the retirement requirements. The terms of the contract, regarding entitlement to renewals as a retired agent, are clear. Klapp has repeatedly admitted that fact throughout this case, as well as admitting that he does not meet the

retirement definition; he is not 65 years old and does not have ten years of service with UIG. The Court of Appeals properly found the definition of "retirement" to be clear and unambiguous and, as admitted by Klapp, correctly found that Klapp does not meet the definition contained therein.

3. Even If There Is An Ambiguity In The Agent's Agreement, Which There Is Not, Klapp Does Not Have The Years Of Service Necessary To Be Entitled To Payment Of Renewal Commissions Under Any Of The Contractual Provisions Relating To Retirement

According to Klapp, the last sentence of the definition of retirement should be deleted from the Agent's Manual and the years of service portion of Section 5(B) of the Agent's Agreement should be applied. Klapp—having 7 years of service—would then be entitled to 100% of his renewal commissions. This action is allegedly justified based solely upon the supposition of Klapp that the age 65/10 years of service language was a carryover from an earlier version of the contract.² The problem with this proposal is that if the last sentence of the definition of the retirement definition in the Agent's Manual were deleted, the Court would then be required to delete a portion of section 5(A) of the Agent's Agreement to achieve the result Klapp desires.³ In doing so, the Court would be required to either create a modification of the contract or rewrite the contract with respect to the entitlement to renewal commission under the circumstances of retirement. Such action would not only violate sections 9 and 15 of the Agent's Agreement but would be in violation of the law. (14a.); *Lintern v Michigan Mut*

² Even this proposed interpretation of the contract by Klapp is contrary to the clear written terms contained therein. Section 15 of Klapp's Agent's Agreement states: "15. SUPERSEDES PRIOR AGREEMENTS. This Agreement supersedes and terminated all prior agreements and understandings to which Agent and United were parties relating to insurance written for United.

³ The last sentence of section 5(B) of the Agent's Agreement states: "If upon the date of death, disability or retirement, Agent shall have aggregated eight (8) or more years of service under this agreement, his then vesting shall be determined in accordance with the normal vesting schedule." Klapp, admittedly only having seven years of service, would not qualify for retirement renewal commissions even if the Court did as he requests and deleted the last sentence of the definition of retirement contained in the Agent's Manual.

Liability Co, 328 Mich 1; 43 NW2d 42 (1950) (holding that courts will not make a new contract for parties under the guise of construing a contract where plain language of contract and plain meaning of terms would be ignored as a result); *Muhler v Ann Arbor Mach Inc*, 18 F Supp2d 722 (1998) (holding that under Michigan law it is a basic rule of construction that a court cannot change the terms of an agreement; nor can it supply material provisions absent from a clear and unambiguous writing);

However, it has also been said that while courts may look to the past practice of the parties to give definition and meaning to language in an agreement which is ambiguous, past practice is merely an interpretive tool and cannot be used to create a contractual right independent of some express source in the underlying agreement. 11 Williston, Contracts (4th ed), § 32:14, p 507

The interpretation proposed by UIG, that the definition of "retirement" not be deleted, is the proper method of interpretation when there is an ambiguity, which in this case there is not, in the contract. Instead of deleting a portion of the contract, UIG suggests to the Court that if it determines there is an ambiguity in the contract, the Court do as the written terms of the contract clearly suggest, determine that the definition of retirement is applicable, and find that the vesting schedule, as stated in the contract, applies to death and disability at 100% of the then vested amount (2 years of service entitles the agent to 10% of the renewal commissions outstanding, 3 years of service entitles the agent to 30% of the renewal commissions outstanding, and so on). The vesting schedule, upon satisfying the definition of retirement, then applies for after 10 years of service and entitles the agent to 130%, 11 years entitles the agent to 140%, and 12 years entitles the agent to 150%.

This interpretation is the only logical interpretation that eliminates the necessity that the Court rewrite the contract for the parties. This interpretation is the only interpretation that prevents actually deleting a portion of the contract in force between the parties. This interpretation is the only reasonable interpretation that can be made. "In interpretation of a

promise or agreement or a term thereof, the following standards of preference are generally applicable: (a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect; . . .” Restatement Contracts, 2d, § 203, p 93; *South Macomb Disposal Authority v American Ins Co*, 225 Mich App 635; 572 NW2d 686 (1997) (holding that contract should not be interpreted so as to render it unreasonable);⁴ 11 Williston, Contracts (4th ed), § 32:5, p 427 (stating that “[A]n interpretation which gives effect to all provisions of the contract is preferred to one which renders a portion of the writing superfluous, useless or inexplicable”).

Because the interpretation suggested by Klapp, (that the last sentence of the definition of retirement, which requires age 65 and ten year of service, be deleted), would require that another separate section of the contract be deleted, (the last sentence of section 5(A)), in conjunction, those two deletions of the contract violate not only the general rules of contract construction, but established Michigan law. As a result, this Court should refuse to rewrite the contract entered into between the parties and should interpret the contract consistent with the interpretation of the Court of Appeals, giving effect to all terms and provisions of the contract, and affirm the Court of Appeals decision in full.

4. Even If There Is An Ambiguity In The Agent’s Agreement, Which There Is Not, Klapp Is Bound By The Rule Of Contract Construction That The First Of The Conflicting Contractual Provisions Controls The Agreement Between The Parties

Klapp suggests that the definition of retirement simply be deleted. The result of which, of course, then suggests that Klapp’s retirement renewal commissions would be governed exclusively by the vesting schedule. UIG, on the other hand, requests that the rules of contract

⁴ Significant procedural history omitted.

construction be consistently applied in this case. One of the rules of contract construction in the State of Michigan is that when there are conflicting clauses in a contract, the first of the two conflicting clauses must control the agreement between the parties. *Klever v Klever*, 333 Mich 179; 52 NW2d 653 (1952); *Psutka v Michigan Alkali Co*, 274 Mich 318; 264 NW 385 (1936) (holding that rule of first of two conflicting clauses controls applies only where it is impossible to fairly reconcile clauses); *Berk v Gordon Johnson Co*, 232 FSupp 682(1964); *Central Jersey Dodge Truck Center, Inc v Sightseer Corp*, 608 F2d 1106 (1964).

In this case the conflicting clauses deal with the payment of renewal commissions upon retirement and what "retirement" means for purposes of the contract. The first time the issue of retirement is addressed in the contract is in section 5(A) of the Agent's Agreement. Immediately, the agent is referenced to the definition of retirement in the Agent's Manual so as to give context to the provisions that follow in the contract. Section 5(A) states:

5. VESTED COMMISSIONS. Commissions shall be vested in the following manner:

(A) Death, Disability, or retirement during the term hereof. Upon the death, disability or retirement **(as those terms are defined in the *Agent's Manual*)**" (12a.)

The term retirement as defined in the Agent's Manual states:

Retirement:

Retirement is understood to be disengagement from the insurance industry. Vestment for retirement is age 65 or 10 years of service whichever is later. (8a.)

Before any discussion in the contract occurs regarding vesting of renewals, percentage of amount vested, forfeiture, or any other aspect of retirement renewal commissions, the agent is specifically and directly pointed to the definition of retirement for purposes of determining

entitlement to renewal commissions. Similarly, in section 5(B) of the contract, the agent is again directed, first and prior to any discussion of the vesting schedule application and related percentages of vesting, to the definition of retirement to first determine whether in fact a discussion of the vesting schedule is even necessary. Section 5(B) states:

(B) Vesting Schedule. In the event of a termination of this Agreement for reasons of death, disability, and retirement **(as defined in the *Agent's Manual*)**

Clearly, the very first order of business in the context of determining renewals to which agents would be entitled is a determination that in fact the agent has met the retirement definition in the contract. Without first satisfying this clear and unambiguous definition of "retirement," a discussion of vesting, the percentage of vesting, the mechanics of the payment of renewals, when the renewals cease, and the like, is absolutely unnecessary.

In fact, in the seven page Agent's Agreement, there are eight separate references to the Agent's Manual and its direct relationship and application to the Agent's Agreement. It is virtually impossible to believe that references to and provisions of the Agent's Manual were simply carryovers from previous versions, as suggested by Klapp. Similarly, it is virtually impossible to believe that the definition of retirement was intended to be something other than what the language of the Agent's Manual provides. Regardless, the definition of retirement is in fact contained in the Agent's Manual and is a part of the Agent's Agreement and the contract between the parties.

As such, all contract provisions relating to the payment of retirement renewal commissions are subject to the retirement definition and the definition is at the forefront of the contract in that regard. In interpreting the contract, assuming there is a conflict in the contract regarding the entitlement to retirement renewal commissions, which there is not, this Court

must interpret the conflicting provisions and reject the later vesting schedule interpretation interposed by Klapp. To do otherwise would be to back out the explicit definition of retirement in favor of the general vesting schedule interpretation and would turn the rules of contract construction in Michigan upside down.

B. Klapp's Entitlement To Retirement Renewal Commissions Is Moot As Klapp Does Not Currently Meet The Definition of Retirement He Suggests

Klapp suggests that the second sentence of the definition of retirement in the Agent's Manual should be deleted and that the only requirement be that Klapp be disengaged from the insurance industry. "Retirement is understood to be disengagement from the insurance industry." (8a.) However, even under Klapp's definition of retirement, he is not now retired. A licensing history for Klapp has been obtained from the Michigan Insurance Division, which shows that Klapp is currently engaged in selling insurance in the State of Michigan. (22b.-30b.) Now that Klapp is engaged in the insurance industry with another agency, it is likely that he will "roll" policies he wrote in the past and take business away from UIG. In addition, the concept of retirement benefits is that one is rewarded for a now ended long career in a certain vocation; hence the contract requirement that agents be age 65 to be entitled to retirement renewal commissions.

Under the circumstances of Klapp now being engaged in the insurance industry again, the issues raised by Klapp are moot and the appeal should be dismissed, or at the least stayed pending Klapp's disengagement from the insurance industry, which is the admittedly applicable definitional requirement to entitlement to retirement renewal commissions under the contract in this case. *UAW v Governor, 388 Secretary of State*, 170 Mich App 88, 93; 408 NW2d 112 (1987) (holding that when intervening changes in a case's factual circumstances make it impossible for a court to fashion a remedy, the case has become moot and should be

dismissed). In this case, Klapp does not even meet his own definition of retirement and therefore, admittedly, is not entitled to retirement renewal commissions. As a result, this case should be dismissed. "A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." Black's Law Dictionary 1008 (6th ed 1990).

C. In A Contract Without Bilateral Negotiations, There Is No Need To Look To Extrinsic Evidence As The Intent Of The Non-Drafting Party Is Irrelevant

The issue the Court directed the parties to brief is: Where, as in the present case, a contract is drafted entirely by one party, without any bilateral negotiations, is extrinsic evidence admissible to clarify ambiguity in the contract or is any ambiguity in the contract simply to be construed against the drafter (without considering any extrinsic evidence)?

In the instant case, the contract was presented to Klapp for signature. The contract is in the nature of a "fill-in-the-blanks" document whereby the contracting agent simply inserted the date of the signing of the agreement, the agent's name and the County and State of his residence. (10a.) In this regard, Klapp gave no input into the terms of the agreement and his intent regarding the manner in which the contract was to be performed is irrelevant. There was no negotiation with respect to the percentage of renewals payable, the conditions by which commissions would be forfeited, whether entitlement to renewals was assignable, the conditions of termination of the Agent's Agreement, the extend of the agent's authority, the right to modify the agreement, the entitlement to renewals upon retirement, the definition of retirement, or any other aspect of the agreement. Simply, the Agent's Agreement was presented to Klapp for signature on a "take-it-or-leave-it" basis. Klapp decided to take it, under the terms and conditions as presented by UIG. Klapp negotiated no aspect of the agreement

and as such, his understanding and intent as to the terms of the agreement and the implementation thereof is irrelevant in interpreting the "intent of the parties." The relevant intent in this matter is that contained in the written document and extrinsic evidence can shed no light on the *parties'* intent.

Under the circumstances of this case, the Court should find that resort to extrinsic evidence in this case is unnecessary and should interpret the contract by the terms contained therein. Ambiguity, if any, should be construed in a manner that makes all terms of the contract applicable, to the extent they can be, and against the drafter of the contract to the extent the construction of the contract in that manner is reasonable.

UIG's research in regard to the specific issue this Court has raised and directed the parties to brief uncovered only one case directly on point, *SI Management LP v Wininger*, 707 A2d 37 (1998), decided by the Supreme Court of Delaware as an issue of first impression for the court.

In *SI Management LP v. Wininger*, Synthetic Industries LP, (the Limited Partnership), a Delaware limited partnership was formed for the purpose of acquiring Synthetic Industries, Inc., (the Company). SI Management LP is the general partnership (General Partnership) of the Limited Partnership. The Limited Partnership's share of the Company's stock was not offered in an Initial Public Offering (IPO) due to opposition by a number of the approximately 1,850 limited partners. Issues arose regarding the strategy that would provide for the best return on the limited partner's investment, resulting in a lawsuit being filed.

The action in *SI* was commenced when Dwight Wininger, a limited partner, alleged that the General Partner and those individuals and entities that control the General Partnership breached their fiduciary duties by failing to attempt to sell the limited partnership's shares of the Company's stock, or the Company as a whole, to a single purchaser for a control premium.

After the action was filed, the defendants announced a "Plan of Withdrawal and Dissolution." Under the Plan, each limited partner was given the choice of either exchanging his interest in the Limited Partnership for cash through a public offering or receiving at a later date his proportionate interest in shares of the Company. All parties agreed that the implementation of the Plan would have required amendments to the Limited Partnership Agreement to eliminate restrictions regarding the withdrawal and distribution of partnership interests.

Subsequently, the defendants filed a Joint Proxy Statement and Prospectus with the Securities and Exchange Commission and began soliciting proxies in support of the Plan. Thereafter, Wininger and another limited partner moved to amend the original complaint and for a preliminary injunction to enjoin implementation of the Plan. Plaintiff alleged that the amendments necessary to carry out the Plan were in violation of the Limited Partnership Agreement.

The lower court in Delaware, the Court of Chancery, granted the preliminary injunction, enjoining the implementation of the Plan, but allowing a meeting of the limited partners to go forward to vote on the Plan. Interlocutory appeal was sought and granted by the Delaware Supreme Court to consider an important question of contract interpretation; when there are no bilateral negotiations, is it necessary to look to extrinsic evidence in aid of interpretation?

In Delaware, there was some judicial history regarding the parameters of the use of extrinsic evidence in the context of a bilateral negotiated contract. The court in *SI*, in reconciling its holding in the case at bar stated:

In *Eagle*, the fundamental fact that led inexorably to the need to consider extrinsic evidence established that the two parties to the agreement (business people on an equal footing with each other) negotiated back and forth on the key indemnity provision and its risk-allocation consequences.

Here, the setting in which the Limited Partnership came into existence appears on this record to be quite different from that in *Eagle*. *This was not a bilateral negotiated agreement. Rather, it appears that the General Partner solicited and signed on 1,850 investors to the [limited partnership] Agreement that those investors had no hand in drafting. Based on that premise, the principle of contra preferentem applies. Accordingly, ambiguous terms in the [limited partnership] Agreement should be construed against the General Partner as the entity solely responsible for the articulation of those terms. Id. at 43.*

. . .

Accordingly, extrinsic evidence is irrelevant to the intent of all parties at the time they entered into the agreement.

The rhetorical question posed by the facts of the instant case is: If Klapp did not participate in drafting or negotiating the terms of the Agent's Agreement, why is his intent regarding the terms of the agreement relevant to an interpretation of the meaning of those terms? Obviously, it is not. The answer to that question formed the basis for the decision of the Supreme Court of Delaware in *SI*, and should be the analysis adopted by this Court in the instant case. Extrinsic evidence of Klapp's understanding of the terms of the Agent's Agreement is irrelevant. He simply agreed to the deal as embodied in the Agent's Agreement and Agent's Manual exclusively drafted by UIG. The only relevant inquiry for this Court is an inquiry into the terms of the agreement between the parties as embodied in the Agent's Agreement and Agent's Manual. The ambiguities in the terms of the agreement, if any, should be construed against the drafter, to the extent such a construction is reasonable.

D. In Construing The Contract Against UIG, The Court Is Not Required To Accept The Interpretation Proposed By The Non-Drafting Party

Under Michigan law, the primary function of the court in interpreting and construing a contract is to give effect to the parties' intentions at the time they entered into the contract and

the best evidence of that intent is the contract itself. *United Rentals v Keizer*, 202 Fsupp2d 727 (WD Mich 2002). In construing the terms of the contract in situations such as this, where ambiguous terms in the written agreement will be construed against the drafter, the court is *not* bound to accept the interpretation offered by the non-drafting party. *De Bruyn Produce Co v. Romero*, 202 Mich App 92; 508 NW2d 150 (1993), citing *Sprick v. Regents of Univ of Mich*, 43 Mich App 178, 186; 204 NW2d 62 (1972), *aff'd* 390 Mich 84; 210 NW2d 332 (1973).

The foregoing principles are particularly important in the instant case. Klapp requests that the Court actually delete a portion of the agreement between the parties. Klapp would have this Court delete the definition of retirement in the Agent's Manual requiring that in order to retire, the agent must be age 65 and have 10 years of service with UIG. This position is incredible, particularly in light of the fact that Klapp claims he is retired and thus entitled to retirement renewal commissions. Klapp wants to delete only a portion of the definition of retirement - the portion that he does not satisfy. Klapp then requests that the Court take the next step and add into the contract his definition of retirement, which not surprisingly does not include the age 65/10 years of service retirement requirement.

Klapp's request goes far beyond the bounds of contract construction, but impermissibly requests that the Court actually **modify** the contract so that he fits **some** definition of retirement. Klapp, having not assisted in drafting the agreement, or negotiating any aspect of the agreement, simply has absolutely no basis to claim that his understanding of retirement, at the time he entered into the contract, did not include the age 65/10 years of service requirements.

It is one thing to construe all the terms of the contract against UIG, it is quite another to do as Klapp requests, delete a portion of the contract in favor of the non-drafting party.

Notwithstanding, it is argued by Klapp, that he read and understood the terms of the Agents

Agreement and Agent's Manual, including the definition of retirement. To do as Klapp requests would be an unreasonable interpretation of the contract. *City of Detroit v AW Kutsche & Co*, 309 Mich 700; 16 NW2d 128 (1944) (holding that all clauses of a contract must be given effective and reasonable meaning); *Port Huron Area School District v Port Huron Educ Ass'n*, 120 Mich App 112; 327 NW2d 413 (1982) (holding that courts will not interpret a contract in a manner which would impose an absurd result or impossible condition on one of the parties); *Kenyon v. Automatic Instrument Co*, 160 F2d 878 (1947) (holding that construction of a contract which is reasonable will prevail over one that is unusual and extraordinary).

UIG, on the contrary, requests that this Court review *all* the provisions of the contract that are applicable to retirement, without ignoring or deleting any. In a, "the best defense is a good offense," tactic, Klapp asserts that UIG seeks to delete the vesting schedule. That is simply not the case. The vesting schedule applies to those who **die or become disabled**, those agents are then entitled to 100% of the percentage payable pursuant to the vesting schedule. With respect to those that retire, the vesting schedule becomes applicable only after the agent first satisfies the definition of retirement in the Agent's Manual, age 65/10 years of service. Those agents that retire with more than ten years of service are paid accordingly; 10 years – 130%, 11 years – 140%, 12 years – 150%.

In construing the terms of the contract in Klapp's favor, absent literally re-writing the contract or a wholesale modification of the agreement as it relates to the entitlement to retirement renewal commissions by an agent, there is simply no reasonable way to construe the contract to entitle Klapp to retirement renewal commissions when **he only has 7 years of service and is in his late forties**, in light of the fact that the agreement contains the age 65/10 years of service retirement definition. Klapp, understanding this fatal aspect of his proposed interpretation, seeks to direct the Court's attention to the fact that under conditions of

death or disability the vesting schedule has no meaning, so, it is argued, the vesting schedule must apply to retirement; the argument, of course, omitting the age 65/10 years of service requirements in the Agent's Manual. The inherent problem with Klapp's focus shifting is that the contractual provisions he attempts to impeach simply have no relationship to the facts of this case. Klapp is not dead, nor is he disabled. In construing the terms of a contract in the context of this case, to opine or speculate on the effect of the terms of the contract on a dead or disabled agent would be tantamount to an advisory opinion on a potential factual issue not before the Court and far beyond the scope of the narrow issue presented; whether Klapp is retired under the terms of the Agent's Agreement and Agent's Manual. Similarly, there is no case or controversy with respect to the issue Klapp shifts the focus to; the application of the Agent's Agreement and Agent's Manual to agents who die or become disabled. Once again, Klapp is neither dead nor disabled and the argument presented by Klapp in that regard is an exercise in fiction. *In re Certified Question, No. 118261*, 2001 Michigan Supreme Court, LEXIS 183, (Michigan Supreme Court, February 14, 2001); *Black's Law Dictionary* (6th ed), p 54.

CONCLUSION

Based upon the foregoing argument, Defendant-Appellee United Insurance Group Agency, Inc., respectfully requests that this Honorable Court AFFIRM the Court of Appeals as its decision relates to the May 19, 1998 denial, in part, of UIG's motion for summary disposition and April 13, 1999 Judgment entered in Klapp's favor in the amount of \$45,882.00.

Date:

12/9/02

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